

# Book Reviews

## Trial Tactics: Sponsorship Costs of the Adversary System

*Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials.* By Robert H. Klonoff \* & Paul L. Colby.\*\* Charlottesville: The Michie Company, 1990. Pp. xvii, 291. \$55.00.

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Any book that commences with a foreword written by a United States Deputy Attorney General proclaiming it the result of “inspired thinking”<sup>1</sup> and the legal equivalent of Darwin’s *Origin of Species*<sup>2</sup> demands attention, even if mixed with some incredulity. When the first review of the book, written by a prominent practitioner, deems it “a bible on how to save the advocacy system,”<sup>3</sup> incredulity grows. All this for a book about trial strategy? The authors

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1. ROBERT H. KLONOFF & PAUL L. COLBY, *SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS*, at xiii (1990) [hereinafter cited by page number only].

2. P. xv.

3. Robert F. Hanley, *A New Perspective on Trial Practice*, *INSIDE LITIG.*, Oct. 1990, at 12.

of *Sponsorship Strategy* plainly agree that they deserve just reverential accolades: unlike other books, they claim, theirs alone brings "order to the chaos."<sup>4</sup>

Lawyers should not discount the significance of the issues raised in *Sponsorship Strategy* simply because of the evident confusion of its authors and admirers in mistaking it for holy writ. To end the suspense quickly, let me assure readers that *Sponsorship Strategy* gives little indication of having been divinely inspired. Worse yet: many of its most significant conclusions are unpersuasive. And yet: it raises a bevy of significant issues about the workings of the adversary system.

## I

*Sponsorship Strategy* is rooted in an acute insight. Juries treat evidence differently depending upon who "sponsors"—introduces—it. Starting from this concept, the book spins out an expansive theory.

Juries, Klonoff and Colby maintain, view lawyers as "hired guns." That being so, juries infer that each side's case can be no better than that offered by its attorney, and any concession by an attorney is held strictly against his client. Accordingly, juries "have an insatiable appetite for concessions"<sup>5</sup> from counsel precisely because counsel can be relied upon with total confidence to represent his client's interests and to concede points only when he must.<sup>6</sup>

So far so good. There is more in *Sponsorship Strategy* that is persuasive. Decisions made by counsel to call witnesses or introduce evidence, claim the authors, are held against counsel's client in the sense that juries conclude that counsel must believe "that the testimony was important enough to justify the effort."<sup>7</sup> If it is not, the side introducing the evidence suffers accordingly. Moreover, just as any concession made by counsel will be held against his client, any statement made by a witness called by that counsel is likely to be as well. By "sponsoring" a witness, the book urges, counsel (and thus his client) vouch for her and are thus tarred by the witness' unpersuasiveness.

A telling conclusion follows: when counsel introduces weak corroborative evidence to bolster a case, a jury may well take it not as adding incremental support to an already strong case but as a concession that the case is so weak that such evidence is needed. Weaker evidence thus dilutes stronger evidence. Worse yet, a jury may well focus on the weaker evidence alone. Reasoning from premises such as these, the authors offer some persuasive conclusions:

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4. Paul L. Colby & Robert H. Klonoff, *Opening Statement: Sponsorship Strategy*, LITIG., Spring 1991, at 1.

5. Pp. 19-21.

6. Cf. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2430 (1991) ("A self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one's own criminal liability, arrogance, or lack of integrity, and so all the more easy to credit when it happens.").

7. P. 30.

avoid weak evidence; try your case as quickly as possible, avoiding duplicative, unimportant or inferior evidence.<sup>8</sup>

But *Sponsorship Strategy* goes too far. It is one thing to say that counsel should generally use only strong evidence; it is quite another to maintain that there is *no* risk that opposing counsel will use a counsel's failure to call a somewhat weak but still supportive witness to suggest that the witness was not called because her testimony would have been harmful. The authors provide opinion letter quality assurances: "A critical teaching of this book," they say, "is that such a fear is unjustified as long as the item of evidence in question is equally available for use by the opponent and the jury is aware of that availability."<sup>9</sup> But why is this so? If counsel to a defendant in an employment discrimination case does not call a former employee available to both parties, how clear is it that a court will bar the plaintiff from suggesting that the defendant did not call the witness for fear of what she would say? Or that the jury will not, despite the ostensible availability of the witness to both sides, hold it against the defendant that it has not called her? Such risks may be worth taking—they often are—but it is misleading to suggest that they do not exist.<sup>10</sup>

*Sponsorship Strategy* is guilty of worse sins than providing false comfort to litigators: it is prone to continuing overstatement of its case. The authors do not content themselves with warning that the introduction of evidence can backfire. They claim that *every* introduction of *every* piece of evidence leads a jury to conclude that this was the best counsel and client could do and that this, in and of itself, is thus "a harmful concession of no better evidence."<sup>11</sup> In fact, they argue that every time counsel introduces anything into evidence, his client pays a price since counsel thereby acknowledges the materiality of the evidence. The authors argue that counsel pays an additional cost for introducing evidence. Since the jury will assume each side has carefully "packaged" the evidence it submits, the jury will discount all favorable evidence that counsel introduces. The result, according to the authors, is inescapable: Counsel should introduce even favorable evidence only when it is strong enough to

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8. P. 30.

9. P. 64.

10. The authors maintain that where a witness is available to both sides, argument will not be permitted that one counsel did not call the witness for fear of what she would say. Pp. 66-67. The only case cited that actually bears on what argument will be permitted, however, *Evans v. Multicon Constr. Corp.*, 375 N.E.2d 338 (Mass. 1978), was severely undercut by the more recent Massachusetts ruling in *Commonwealth v. Niziolek*, 404 N.E.2d 643 (Mass. 1980), which permitted comment on the failure of a defendant in a criminal case to call a witness available to both sides "when it . . . appeared that the posture of the case was such that the defendant would be naturally expected to call the witness." *Id.* at 646; *see also* *State v. Moore*, 620 S.W.2d 370, 373 (Mo. 1981) (en banc) ("[T]he prosecuting attorney may comment on the failure of the defendant to call available witnesses who might reasonably be expected to give testimony in his favor.") (quoting *State v. Beasley*, 182 S.W.2d 541, 544 (Mo. 1944)); *People v. Ford*, 754 P.2d 168 (Cal. 1988) (en banc) (same).

11. Pp. 36-37.

outweigh the "cost" of sponsorship and should, in virtually all cases, seek to shift the cost by inducing the *other* side to introduce the evidence.<sup>12</sup>

A memorable image is thus offered: two sides, each having read *Sponsorship Strategy*, spending an entire trial seeking to lure the other into introducing particular data into evidence. Board games have been conceived out of less original visions.

The difficulties with the book's more far-reaching arguments, however, lie in their premises. On what basis do the authors claim that jurors react one way or another to the introduction of evidence? On what basis do they assert that jurors discount evidence because they believe it has been "packaged?" What basis is there for concluding that any price at all is paid, for example, when one party places in evidence the criminal record of a witness testifying against it?

The book cites no social science data. It relies on no scholarly studies of jury behavior. While the authors have tried scores of cases, they rarely cite to them and more rarely still even seek to demonstrate by example how they used their strategy to win cases they think they otherwise would have lost. In fact, one of their criticisms of previously published trial practice books—that "when an issue arises that happens to be addressed in a manual, the reader is expected to accept the advice wholly on faith"<sup>13</sup>—applies to a considerable degree to their own book.

Consider the authors' position that counsel should attack his opponent's position as well as pressing his own. Based on my own trial experience, I agree—at least as a generality. But *Sponsorship Strategy* goes further. It argues that attack is virtually always to be favored because juries "expect" an "interested advocate" to do so.<sup>14</sup> They cite nothing in support of this other than their generalization (also unsupported by data) that juries expect counsel to behave as "hired guns" and a few examples of dubious relevance and persuasiveness.<sup>15</sup> What one is left with, then, is little more than the personal experience

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12. See pp. 63-68.

13. P. 12.

14. P. 33.

15. One example offered is that of a real estate salesperson. In urging a prospective homebuyer to purchase one house rather than another, the authors claim, the "thorough agent will also stress the undesirability of the other house, such as its location in a high crime area." P. 34. This simply ignores the different modes, styles, and circumstances in and by which people seek to persuade others. A lawyer at a law firm seeking to persuade a student to join his firm rather than another might (a) say only good things about the other firm (something I have, on occasion, done); (b) say generally good things about the other firm, while emphasizing specifically attractive characteristics of his own (something I do more often); (c) denounce the other firm (something I would, on only the rarest occasions, do); or (d) refuse to comment on the other firm. All are efforts at persuasion; all, depending upon the lawyer, the applicant, and the law firms in question, may be useful means of persuasion. To simply counsel "attack" is to offer very little advice at all.

The other example the authors cite is even less persuasive. Since President Bush succeeded in his attacks on Governor Dukakis in the 1988 Presidential campaign, the authors maintain, attack is to be favored in the trial context as well. P. 34. In support of this conclusion, the authors cite a column by Pat Buchanan—hardly a disinterested, not to say scholarly, observer. See p. 34 n.28. The success of the Willy Horton-oriented Bush attacks on Dukakis is now conventional political wisdom; so is the view that Dukakis

of the authors (which is relevant but—in the authors' words—something one must take on "faith") and assertions of jury expectations that are unprovable and, in any event, unproved.

## II

The unpersuasiveness of the authors' most significant conclusions is best seen in examining their most radical recommendation, one referred to throughout the book: the introduction, they say, of any *unfavorable* evidence by counsel about his own witness should almost invariably be avoided because it implicitly concedes that the unfavorable evidence is important, thereby enhancing its weight.<sup>16</sup> It is on this issue that *Sponsorship Strategy* takes a path that diverges most significantly from that of virtually every other trial practice book. "Conventional wisdom," one leading commentator states, "has it that you should volunteer weaknesses during the direct examination. In this way, it is believed, you will take the sting out of the weakness by voluntarily disclosing it before the cross-examiner can effectively use it."<sup>17</sup>

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probably should have responded far more militantly, thus perhaps wounding Bush for having started the negative campaigning in the first place. See generally JACK W. GERMOND & JULES WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS: THE TRIVIAL PURSUIT OF THE PRESIDENCY* 1988, at 10-12, 162-64, 357-58 (1989); *Campaign '88: Mediated Reality of the Candidates and the Race for the White House*, 32 AM. BEHAV. SCIENTIST 340 (1989) (collection of articles discussing advertising in campaign). But the attack philosophy in politics has sometimes failed as well as succeeded. Richard Nixon's vaunted approach—"Always attack, never defend"—may have led to some of his political victories, but ultimately to his ruin as well. See generally 3 STEPHEN E. AMBROSE, *NIXON: RUIN AND RECOVERY, 1973-1990* (1991). The reader is, in any event, entitled to ask what any of this has to do with trial practice. If Dukakis had responded more effectively, would that discredit the authors' emphasis on the desirability of attacking one's opponent in the courtroom?

16. P. 38.

17. THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 86 (2d ed. 1988). Another commentator phrases it this way:

Ordinarily if the harmful evidence is directly related to the issues in the case and is a matter that in all probability your opponent will inquire about on cross-examination, it is preferable to produce it on direct examination. It can be offered at a time and manner in the course of the examination that tends to minimize it rather than dramatizing it. Although your opponent probably will make additional inquiry on cross-examination, regardless of your proving the harmful evidence, the effect is likely to be less spectacular than it would have been if the direct examination had been silent on the harmful subject. Also, there is a tactical advantage in taking the position before the jury of willingness to produce all of the facts, facing frankly any unfavorable elements. And, finally, you may minimize the harmful effect of the evidence by offering immediately whatever mitigating explanation is available, rather than having the harm accentuated by a determined pursuit of the matter on cross-examination for a length of time and in ways that develop a strong impression on the minds of the jurors before the explanation can be offered.

ROBERT E. KEETON, *TRIAL TACTICS AND METHODS* 54-55 (2d ed. 1973). Similar advice has been offered to advertisers. See LARRY PERCY & JOHN R. ROSSITER, *ADVERTISING STRATEGY: A COMMUNICATION THEORY APPROACH* 55 (1980) ("[O]ne must consider positive pretreatments that will render the receiver less prone to change his attitude when subsequently exposed to competitive persuasive messages . . ."). But see Robert F. Hanley, *Getting to Know You*, 40 AM. U. L. REV. 865, 873 (1991) (supporting views of Klonoff and Colby).

The authors of *Sponsorship Strategy* disagree. They urge instead that the rule for trial practitioners should be to introduce only favorable evidence, leaving to the cross-examiner the "cost" of placing the unfavorable evidence in the record. Counsel should use redirect examination, the authors argue, to rehabilitate a witness or a client who has been damaged on cross-examination.<sup>18</sup>

It is here that the limitations of *Sponsorship Strategy* are most evident. Is the "cost" of introducing evidence really so overwhelming that counsel offering a witness with a major credibility problem must subject the witness to cross-examination without having prepared the jury at all for the battering that is to come? Examples cited by the authors are less than persuasive. By bringing out a prior criminal record of one's own witness, they contend, counsel permits his adversary to argue in summation: "The witness' prior conviction is critical to the assessment of his credibility. Even my opponent went out of his way to make sure that you knew about it."<sup>19</sup>

But this is hardly the devastating response Klonoff and Colby seem to think it is. It can surely be met by saying:

As you know, Ms. X had a prior conviction. We, not our opponents, made sure that you had that information. We hid nothing from you. But the prior conviction is just that—no more or less. What really matters is not the fact of the old conviction but the commitment to tell the truth that Ms. X brought to her testimony: her knowledge of the facts; her motive to tell you those facts; her willingness to do so.

Other attempts by the authors to illustrate the undesirability of virtually ever acknowledging on direct examination the existence of any harmful material about one's client (or the witnesses one offers) are even less persuasive.<sup>20</sup> Even if the client has previously been convicted of *murder*, Klonoff and Colby argue, that fact should not be elicited on direct examination in a criminal case in which he is testifying on his own behalf. The price, they acknowledge, of not doing so is that opposing counsel could say the following in summation:

Ladies and Gentlemen of the Jury, do you recall how I had to bring out the full facts on cross-examination? The fact of the matter is: if I hadn't brought out the defendant's murder conviction, you never would have heard about it. Evidently that's how my opponent wanted it—why else would he have omitted evidence of his client's conviction in his presentation? Perhaps his strategy was a recognition that you would

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18. P. 87.

19. P. 87.

20. The only situation in which the authors acknowledge the desirability of presenting such material on direct examination is when the jury is apt to conclude that "the advocate, by seeming to take unusual efforts, went *out of his way* to omit it." P. 88. Even then, the authors caution that the acknowledgement of any weakness may not be worth the cost. P. 89.

not render a favorable verdict if you heard all of the evidence. Plainly, consideration of the *full* story—all of the evidence—requires a verdict in my client's favor.<sup>21</sup>

The persuasive response, the authors suggest, would be the following:

Ladies and Gentlemen of the Jury, my opponent has suggested that the fact that I did not bring out my client's prior criminal conviction somehow suggests that I didn't think you'd render a verdict in my favor if you heard it. That is simply wrong. I wasn't trying to *hide* something from you. I obviously knew that my opponent could bring it out if I didn't. I didn't bring it out because it has *nothing* to do with this case. The fact of the matter is: the prosecutor has such a weak case that he's desperately trying to convict my client by relying on a crime he committed ten years ago for which he has already paid his dues.<sup>22</sup>

But this is simply incredible. What jury would believe the lawyer who had not even referred to a prior murder conviction of his client when he solemnly pronounces that he wasn't trying to *hide* anything? In fact, who but a lawyer could believe that a jury would believe that a prior murder conviction of his client has *nothing* to do with his client's credibility—or guilt—in a later criminal case?<sup>23</sup> That the authors of a work on trial practice are so removed from the reality of the courtroom is troubling.

Obviously the authors and I differ about the impact of such matters on a jury. In the absence of analysis of jury studies, biographies of lawyers, or the like, how can one decide? To test the authors' thesis on some more meaningful basis, I decided to review the trial records of two of the most notorious cases in recent years in which counsel confronted that very strategic judgment. I added a third case in which I was trial counsel. As will be seen, the central teaching of *Sponsorship Strategy* seems, at best, dubious.

#### A. *The Alger Hiss Trial*

In 1948, Whittaker Chambers, a former agent of the Communist Party, accused Alger Hiss, a respected Washington lawyer, of membership in an underground cell of the Communist Party. In testimony before the House

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21. P. 284. In fact, by use of clearer, less cliché-ridden and more forceful language (and by leaving out leaden words such as "presentation," "render," "consideration," and the like) the summation could be far more effective. Cf. EVAN THOMAS, *THE MAN TO SEE* 456 (1991) (objection by Edward Bennett Williams to prosecutor's asking to "tender the evidence" on grounds it was incomprehensible).

22. P. 285.

23. To put the point a different way, one of the prime reasons defendants rarely testify on their own behalf is because of the expected adverse impact on them when juries learn of their prior convictions. To expect *no* harmful effect on a defendant when a jury learns of his prior murder conviction is fanciful. Cf. Arnold H. Lubasch, *Gotti Trial Judge is Urged to Limit Cross-Examining: Question of 3 Mob Witnesses is at Issue*, N.Y. TIMES, Jan. 28, 1991, at B3 (motion of prosecution in John Gotti racketeering trial to bar cross-examination of former high-ranking mob figures about details of murders they had committed).

Committee on Un-American Activities and a federal grand jury, Hiss denied the allegation. Hiss was thereafter indicted and, after his first trial ended in deadlock, convicted of having committed perjury in his grand jury testimony. In the first trial, the centerpiece of the government's case was Chambers' testimony that Hiss had delivered classified State Department documents to him as part of an espionage ring. Assistant U.S. Attorney Thomas Murphy conceded in his opening, "[I]f you don't believe Chambers then [the government has] no case . . . ."<sup>24</sup> The first Hiss trial was thus a credibility battle between the accused, Hiss, and his accuser, Chambers.<sup>25</sup>

Chambers, however, was hardly an ideal star witness. He had lied to both the House Un-American Activities Committee and the grand jury that investigated Alger Hiss. When asked whether he had any documents that could support his accusations, Chambers did not disclose that Hiss had given him classified documents as part of an espionage ring. In fact, Chambers did not make the allegedly incriminating documents public until some months later, when Hiss was suing him for defamation. Chambers' own history of perjury thus rendered him particularly vulnerable to an attack on his credibility.

At the first trial, Murphy initially questioned Chambers about the details of his personal life and activities in the Communist Party. Murphy insisted that he was entitled to this line of questioning in light of the defense's intention to bare Chambers' life history for the purpose of affecting his credibility.<sup>26</sup> Murphy apparently felt it important to question Chambers about these activities in order to have Chambers admit the worst of his checkered history, thereby preempting the defense from exposing Chambers' defective past.

Not until the end of his questioning did Murphy raise the issue of Chambers' lying to Congress and the grand jury. Murphy summarily asked Chambers if he had disclosed his possession of the documents to the House Un-American Activities Committee or the grand jury, but did not question Chambers specifically about the substance of his testimony. Chambers testified that he could not recall if he had been asked about the existence of any documents by Congress or the grand jury, but said that he would, in any event, have lied and said that he had no such documents.<sup>27</sup>

Hiss' attorney, Lloyd Paul Stryker, who had a well earned reputation for flamboyant and often brilliant cross-examination, lost no time in questioning Chambers about his history. Stryker was most forceful when he fired a series of questions at Chambers about his testimony before the grand jury investigating Hiss, racking up the number of times Chambers had perjured himself:

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24. Transcript at 24, *United States v. Hiss* (No. CR 128-402) (S.D.N.Y. July 8, 1949).

25. The Hiss trial is recounted in numerous books. See, e.g., WHITTAKER CHAMBERS, *WITNESS* (1952); ALISTAIR COOKE, *A GENERATION ON TRIAL* (1950); ALGER HISS, *RECOLLECTIONS OF A LIFE* (1988); JOHN C. SMITH, *ALGER HISS: THE TRUE STORY* (1976); ALLEN WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE* (1978).

26. Transcript, *supra* note 24, at 116-18.

27. *Id.* at 224-25.



Q. Mr. Chambers, I think two days ago you told us that you had committed perjury before the grand jury in October of last year, is that right?

A. That is right.

Q. Now, his Honor has allowed me to examine certain pages of the grand jury minutes, and before I come to that, what is your recollection as to how many times you committed perjury before that grand jury?

A. Once, as nearly as I can recall.

Q. Just once?

A. I believe so.

Q. That is all you remember?

A. That is what I remember.

Q. Mr. Chambers, at page 3272 of the grand jury minutes were you asked this question and did you give this answer: "Q. Mr. Chambers, have you any information or knowledge in the period that you were in Washington in your underground work to the present time . . . of any individuals in the employ of the Government furnishing information to any unauthorized sources? That is a general question and you can treat it in any way you wish. A. I can't say that I have specific knowledge of the transfer of information. I know of knowledge of certain contacts. Is that what you mean?"

Did you give that answer?

A. Yes.

Q. Was your answer true or false?

A. False.

Q. It was a lie?

A. It was.

Q. And you made it knowingly?

A. Yes.

Q. And that was after you had taken the oath as you have in this court?

A. That is right.

Q. You lied and perjured yourself on that occasion?

A. That is right.

Q. Thank you. Now, were you also asked this question, the same page . . . "Q. What do you mean by contacts? A. I know that various people were in touch with J. Peters or other Communists. Q. Now beyond being in touch with them, that is, to meet them or talk with them or something of that sort? A. That is right. Q. Have you any knowledge that people in the employ of the Government furnished information? A. No."

Were these questions asked you and did you give those answers under oath?

A. I did.

Q. They are false?

A. They are.

Q. And perjury?

A. They are.

Q. That is the second perjury before the grand jury?

A. That is right.

Q. At that point did one of the grand jurors ask this question: "Juror: Did the witness get any himself? The Witness: No. That was not my function."

Was that question asked you and did you give that answer under oath?

A. I did.

Q. And was that false?

A. It was.

Q. And perjury?

A. It was.

Q. That was your third perjury before the grand jury?

A. That is right.<sup>28</sup>

And so forth, through four more examples. During his redirect examination, Murphy tried to dilute the impact of Stryker's cross-examination by asking Chambers to explain why he had not disclosed the existence of documents to the grand jury. Chambers testified that he had not turned over the documents because he wanted to minimize any injury to Hiss:

Q. Will you tell this Court and jury what you told the grand jury.

A. As nearly as I can remember I told them that in testifying from August on I had had two purposes; one was to disclose in part and to paralyze the Communist conspiracy; the other purpose was to preserve from injury in so far as I could all individuals involved in the past in that conspiracy.

Any revelation involved injury, but I told them [sic] are degrees of injury and I sought to keep them from the ultimate consequences of what they had done.

I was particularly anxious not to injure Mr. Hiss any more than necessary out of grounds of past friendship and because he is by widespread consent a very able man. Therefore, I chose to jeopardize myself rather than reveal the full extent of his activities and those of others.<sup>29</sup>

It is possible that Murphy chose not to question Chambers on direct examination specifically about his inconsistent testimony because he believed it would be more damaging to Chambers' credibility to have this evidence introduced by the prosecution. Yet this is unlikely because Murphy did introduce other evidence of Chambers' checkered past in an apparent effort to preempt the defense from exposing this evidence. In any event, Murphy behaved just as the authors of *Sponsorship Strategy* counsel: he did not introduce this harmful evidence on direct, thus forcing Stryker to incur the supposed "sponsorship cost" of introducing the evidence. Once introduced, moreover, Murphy did just what Klonoff and Colby advise: he sought to minimize the

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28. *Id.* at 462-64.

29. *Id.* at 529-30.

impact of Stryker's cross-examination by showing Chambers' benevolent motive in lying to the grand jury.

Was Murphy's tactical decision correct?<sup>30</sup> While it is impossible to know, it is also impossible to ignore the far greater force that Stryker's cross-examination appeared to have in light of Murphy's tactical decision.<sup>31</sup> What "cost" was there to Stryker to go through each of Chambers' lies, one by one, in an effort to destroy him? And how, in any event, would Murphy's more detailed focus on the lies—and Chambers' defense of his motivation in making them—in his direct examination have conceded *anything*, given his own acknowledgment to the jury that Chambers' credibility was central to his case?

#### B. *The Jean Harris Trial*

In 1981, Jean Harris, the headmistress of the exclusive Madeira School in McLean, Virginia, was accused of murdering her lover of fourteen years, Dr. Herman Tarnower, the author of a best selling diet book. Harris readily admitted that her gun had shot the doctor, but claimed that Tarnower had been fatally injured during a struggle over the weapon. According to the prosecution's theory of the case, Harris had intentionally killed Tarnower because she was jealous of his relationships with other women.<sup>32</sup>

At trial, Harris testified in her own defense. While on direct examination, the defense introduced several letters she had written to Tarnower in 1978 and 1979 to show her state of mind—that she had accepted Tarnower's affairs with other women, yet remained devoted to him—and to rebut the prosecution's theory that, because Tarnower had rejected her love, she was moved to kill him. One key letter, however, the defense expressly chose not to introduce. In fact, the defense not only declined to introduce the letter (which came to be known as the "Scarsdale letter"), but went to great lengths to exclude it from the trial,

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30. If anything, Murphy's decision to ask Chambers any questions on direct eliciting the fact that he had lied at all involved more disclosure to the jury than Klonoff and Colby favor.

31. The jury deadlocked in the first Hiss trial, eight to four for conviction. In the second Hiss trial, Murphy no longer stated that the government had no case if the jury did not believe Chambers. Instead, the prosecution emphasized the question of Hiss' credibility, and said that it intended to prove that Hiss had lied to the grand jury "by the immutable documents themselves, documents that just can't change." Transcript at 167, *United States v. Hiss* (No. CR 128-402) (S.D.N.Y. Jan. 21, 1950). Most importantly, Murphy addressed the issue of Chambers' acknowledged perjuries, and disclosed the details of Chambers' inconsistent testimony, a record that the prosecution undoubtedly expected the defense to stress in its case. *Id.* at 163-78. The defense, this time led by Claude B. Cross, did not stress Chambers' credibility, and instead followed the prosecution's lead and called the documents the central issue in the case. *Id.* at 178-201. Notably, the defense did not relentlessly attack Chambers' credibility. After deliberating for less than 24 hours, the jury in the second trial found Hiss guilty of both counts of perjury.

32. For detailed accounts of the Harris trial, see SHANA ALEXANDER, *VERY MUCH A LADY* (1983); DIANA TRILLING, *MRS. HARRIS: THE DEATH OF THE SCARSDALE DIET DOCTOR* (1981).

and only produced it when forced to comply with an order of the Chief Justice of Westchester County.<sup>33</sup>

On direct examination, Harris referred only once to the Scarsdale letter. When asked to recount her activities on the weekend prior to, and the day of, Tarnower's death, she testified that she wrote the letter to the doctor over the weekend. She was not asked substantively about the letter on direct examination and said nothing about its contents.

On cross-examination, the district attorney asked Harris about the contents of the letter. The following exchanges occurred:

Q. How did you refer to Miss Tryforos in that letter?

A. In many very unattractive ways. . . .

Q. How did you refer to Mrs. Tryforos in that letter that you wrote partly on Saturday and partly on Sunday?

A. Well, let me see. I referred to her as what I had experienced her to be.

Q. And what would that be, Mrs. Harris?

A. Dishonest.

Q. Dishonest.

A. Adulterous.

Q. Adulterous.

A. I think I referred to her as a whore.

Q. A whore. What else?

A. That pretty well covers it, I think.

Q. Didn't you use the word your whore?

A. I might have.

Q. Who are you referring to there?

A. The letter was to Hy.

Q. But you used the word your whore. Weren't you referring to the doctor and Miss Tryforos when you used the word your whore?

A. No. I was speaking about Mrs. Tryforos.

Q. Did you use the word your psychotic whore?

A. I might have.<sup>34</sup>

The prosecutor then read the entire letter to the jury. Parts of it follow:

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33. Harris sent the Scarsdale letter by certified mail from the Madeira School's Greenway Post Office in McLean, Virginia, to Tarnower at the Scarsdale Clinic, in Scarsdale, New York, on the day the doctor was killed. The local Westchester postal authorities returned the undelivered letter to Harris' attorney. This decision was protested by the district attorney's office. In the course of the Harris trial, the Chief Justice of Westchester County required the defense to disclose the Scarsdale letter to the trial court for it to decide whether to produce the letter to the prosecution. The defense appealed the order to the New York Court of Appeals, and only after the prosecution had rested its case did the Court of Appeals affirm the order.

It is noteworthy that, as a condition of his retention, Aurnou had agreed to Harris' demand that he not criticize Tarnower. It may be because of this that Aurnou did not introduce the Scarsdale letter during the direct examination of Harris. See TRILLING, *supra* note 32, at 100.

34. Transcript at 7622-23, *People v. Harris* (No. 275-80) (N.Y. Westchester County Ct. Mar. 20, 1981).

Hi. . . .

. . . .

I am distraught as I write this—your phone call to me [sic] you preferred the company of a vicious, adulterous psychotic . . . has kept me awake for almost 31 hours. . . .

. . . .

Twice I have taken money from your wallet—each time to pay for sick damage done to my property by your psychotic whore. I don't have the money to afford a sick playmate—you do. She took a brand new nightgown that I paid \$40 for and covered it with bright orange stains. You paid to replace it . . . . The second thing you paid for (I never replaced it) was a yellow silk dress. . . . Unfortunately I forgot to pack it because it was new and still in a box in the downstairs closet. When I returned it was still in the box rolled up, not folded now, and smeared and vile with feces. I told you once it was something "brown and sticky[.]" It was, quite simply, Herman Tarnower, human shit! I decided, and rightly so, that this was your expense, not mine. As for stealing from you; the day I put my ring on your dresser my income *before taxes* was \$12,000 per year. . . . That you should feel justified and comfortable suggesting that I steal from you is something I have no adjective to describe. I *desperately* needed money all those years. I *couldn't* have sold that ring. It was tangible proof of your love and it meant more to me than life itself. That you sold it the summer your adulterous slut finally got her divorce and needed money is a kind of sick, cynical act that left me old and bitter and sick. . . .

. . . .

You have never once suggested that you would meet me in Virginia at *your* expense, so seeing you has been at my expense . . . . All our conversations are my nickels, not yours—and obviously rightly so because it is I, not you, who needs to hear your voice. I have indeed grown poor loving you, while a self-serving, ignorant slut has grown very rich—and yet you accuse me of stealing from you. How in the name of Christ does that make sense? . . .

. . . .

You have been what you very carefully set out to be, Hi—the most important thing in my life, the most important human being in my life and that will never change. You keep me in control by threatening me with banishment—an easy threat which you know I couldn't live with and so I stay home alone while you make love to someone who has almost totally destroyed me. I have been publicly humiliated again and again but not on the 19th of April [at a dinner in honor of Tarnower]. It is the apex of your career and I believe I have earned the right to watch it—if only from a dark corner near the kitchen. . . . I always thought that taking me out of your will would be the final threat. On that I believed you would be completely honest. I have every intention of dying before you do, but sweet Jesus, darling I didn't think you would ever be dishonest about that.<sup>35</sup>

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35. *Id.* at 7798-812.

Harris was convicted of second-degree murder. It is, of course, impossible to know if she would have been acquitted had the devastating Scarsdale letter not been introduced at trial. What is clear, as Diana Trilling observed, is that the letter “exploded” Harris’ defense. “[T]he Scarsdale letter and its coarse feelings . . . its tone of smoldering hatred and its disconcerting juxtaposition of complaint and entreaty” destroyed the image of Harris as a virtuous, upstanding woman who had unflinchingly accepted Tarnower’s affairs and had devoted herself to him in spite of them.<sup>36</sup>

The defense’s failure even to seek to lessen its impact in advance—by giving Harris the opportunity on direct to explain the pain she felt when she wrote the letter—was a gross miscalculation. Yet, the defense’s tactic of ignoring the letter on direct, thus permitting the prosecution to introduce evidence that was harmful to the defense (and thereby supposedly incurring sponsorship costs) is precisely the approach counseled by Klonoff and Colby.

### C. *The Wayne Newton Case*

In late 1980, NBC News broadcast a news story describing certain links between Wayne Newton, the Las Vegas entertainer, and two highly placed individuals in organized crime named Guido Penosi and Frank Piccolo. Newton filed a defamation action in Las Vegas, claiming that the broadcasts falsely implied that mob sources had helped finance his purchase of the Aladin Hotel in that city. NBC denied that the broadcast implied or was intended to imply that the mob had financed Newton’s hotel purchase but maintained that the broadcast had accurately revealed that a federal grand jury was investigating connections and communications between Newton and the two mob figures and, more specifically, whether those two individuals had assisted him in any way with his purchase of the hotel. NBC also maintained that the broadcast truthfully described Newton’s previously undisclosed relationship with the organized crime figures and that Newton had provided false information to Nevada gaming authorities about those relationships.

Although many issues were raised in the case, a central one concerned the accuracy of Newton’s prior testimony about his relationship with Penosi. In testimony before the Nevada Gaming Board, Newton had acknowledged a few contacts with Penosi over the years but had characterized Penosi as just “a fan” and denied any ongoing “relationship” with him.<sup>37</sup> Newton had testified falsely, as the Court of Appeals observed, that Penosi had never visited him at his home and as to other matters.<sup>38</sup>

Newton had refused to be interviewed by NBC journalists Brian Ross and Ira Silverman at any time prior to his appearance before the Nevada Gaming

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36. TRILLING, *supra* note 32, at 334.

37. *Newton v. NBC, Inc.*, 930 F.2d 662, 677 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991).

38. *Id.* at 676-77.

Board. As he was leaving the room, Ross sought to interview him. The following exchange occurred:

Mr. Ross: When was the last time you talked with [Penosi]?

Mr. Newton: Maybe a year ago.

Thank you.

Mr. Ross: He hasn't made phone calls to you?

Mr. Newton: No.<sup>39</sup>

Both of these answers were false. Newton had talked with Penosi on a number of occasions earlier in 1980, Penosi having called Newton on some of those occasions.<sup>40</sup>

On direct examination, Newton was not asked about the truthfulness of his answers to Ross. On cross-examination, as defense counsel for NBC, I played for Newton and the jury a videotape of his exchange with Ross in which he falsely responded to the journalist's questions about speaking with Penosi. The following exchange then occurred:

Q. Was that true, Mr. Newton?

A. No, it wasn't. But I didn't realize that I was under oath to Mr. Wimp [Brian Ross] over there.

Q. Mr. Newton, you don't tell the truth when you're not under oath?

A. It depends on who's asking, Mr. Abrams.

Q. How do you decide when to tell the truth?

A. I decide to tell the truth when it's important enough and the person asking me has some validity and should be concerned with what I say, and how I say it.<sup>41</sup>

After further questioning about whether Ross had, as Newton testified, behaved in a "Gestapo-like manner,"<sup>42</sup> I played a portion of the tape again and followed with additional questions:

Q. The words that were just said—please correct me if I'm wrong—was, He hasn't made phone calls to you? Answer: No.

That wasn't true either, was it?

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39. 7B Transcript at 8B, *Newton v. NBC, Inc.* (No. CV 88-05848 MDC (JR)) (C.D. Cal. Feb. 10, 1989).

40. According to the Court of Appeals, they discussed threats made against Newton and his daughter by members of an organized crime syndicate. A disagreement over an investment by Newton led to a fight between Newton and a low-level member of an organized crime family. This disagreement precipitated the threats to Newton and his daughter. Newton asked Penosi if he could stop the threats. Penosi, in turn, put Newton in touch with Frank Piccolo, who then arranged with members of the Genovese organized crime family, which was threatening Newton, to stop the threats. *Newton*, 930 F.2d at 672-73, 684-85. Newton testified at trial that he had not called the FBI in an effort to stop the threats despite the fact that he had not then known if the FBI could have helped to do so. *Id.* at 673 n.19.

41. Transcript, *supra* note 39, at 1146.

42. *Id.* at 1147.

A. My attorney had tapped me on the back and said, No comments; just keep walking.

Q. Is that what you said? No comment?

A. My attorney had tapped me on the back and said to me . . . No comment.

Q. I'd like you to listen to my question. My question is, did you tell the truth when Brian Ross said, He hasn't made phone calls to you, and you said, No?

A. I wasn't even necessarily talking to him, Mr. Abrams.

Q. Were you talking to him?

A. No, I wasn't.<sup>43</sup>

Would Newton have fared better if he had been asked first by his own counsel to explain away his false statements to Ross?<sup>44</sup> It is difficult to know. What we can know is that the cross-examination would surely have lost some of its power if Newton had, on direct examination, offered whatever explanation he could for his falsehoods.

\* \* \* \*

It is difficult, based upon the *Hiss*, *Harris*, and *Newton* cases, to offer any broad conclusions about the tactical desirability of counsel bringing out unfavorable information about his witness on direct examination. The basic problems with Chambers, Harris, and Newton as witnesses were, after all, substantive, not tactical: Chambers had repeatedly lied under oath and was now a witness critical to the government's case; Harris had portrayed herself as long-inured to Dr. Tarnower's other affairs but had written a letter the day before she shot him exhibiting rage and jealousy; Newton had frequently provided false answers to questions by Nevada gaming authorities and NBC reporters. No course of conduct by counsel was easy; none could have avoided entirely the risks of a powerful cross-examination. But the decision in each case *not* to anticipate cross-examination by offering on direct the witnesses' best response seems to have been counterproductive.

Suppose, for example, that Chambers had acknowledged in his direct examination that he had previously testified falsely on a number of matters about Hiss to the grand jury and had set forth his alleged motivation of not injuring Hiss "any more than necessary." Or suppose that Harris had, on direct

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43. *Id.* at 1147-48.

44. Perhaps I exaggerate when I suggest that Newton "fared" at all poorly before the jury. The Las Vegas jury awarded him in excess of \$19 million. That award was cut to about \$5 million by the trial court on remittitur. The Court of Appeals then granted judgment for NBC and ordered dismissal of the case in an opinion which emphasized Newton's role as a "local hero" and a "revered figure" in Las Vegas, a city whose citizens "celebrate Wayne Newton Day and have named a major boulevard in his honor." *Newton*, 930 F.2d at 671. Throughout its opinion, the court spelled out in detail Newton's repeated falsehoods, holding that Newton had failed to prove that NBC had broadcast its reports with actual malice. *Id.* at 674, 675, 676, 677, 680, 683, 684.



examination, testified that she had become angry at Tarnower, had written a letter reflecting that anger, but that the anger was (as the letter could be said to reflect) primarily a manifestation of disgust at herself and not, in any event, a prelude to her shooting Tarnower. And suppose that Newton, instead of defending lying as a matter of principle or of denying uttering words clearly heard on the tape played in court, had testified on direct examination that his own anger at Ross, *or* his own unwillingness to discuss publicly his prior conversation with Penosi, *or* his surprise at the questions asked him—or anything else he believed he could defend—had led to his untruthful answers. Any of these efforts would likely have been more effective (and surely not less effective) than the technique of saying nothing at all about these difficult topics on direct examination—the technique advocated by *Sponsorship Strategy*.

### III

At the beginning of *Sponsorship Strategy*, Klonoff and Colby tell a story of a young prosecutor confronted with the following situation: in a robbery case, the only eyewitness had, a month after the crime, selected the defendant's photograph from a mugbook. Since the picture was the first one in the book, the "significance of that selection was dubious."<sup>45</sup> When the eyewitness identified the defendant from a lineup, the identification was "anything but ideal" since the witness' identification (which was videotaped) was hesitant and prolonged.<sup>46</sup> The prosecutor called the witness to the stand, made no reference to the hesitancy displayed on the videotape, and simply had the witness state that he had identified the defendant in the lineup. To the prosecutor's surprise, defense counsel made no use of the videotape.

From the prosecutor's point of view, the result was splendid. The jury never saw the videotape. Even if it had, the authors emphasize, the prosecutor could still have answered that the tape did show the identification. Heads or tails, then, the prosecutor would prevail unless he introduced the tape in evidence himself, thus permitting the defense to argue that he had thus conceded the centrality of the slow and hesitant identification.

There is much that is troubling about this analysis. For one thing, as is true throughout the book, it is unverifiable—as well as counterintuitive—that the introduction of the videotape into evidence by the prosecutor would send a message to the jury that the tape was anything more than a useful visual aid showing the witness' consistency. For another, it is not at all clear that defense counsel acted wisely in declining to introduce the videotape into evidence.

More important, however, is it not even a little bit disturbing that the grand and much self-celebrated result of all the strategizing in *Sponsorship Strategy*

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45. P. 3.

46. P. 4.

was that a jury was deprived of relevant information? However inadvertently, *Sponsorship Strategy* raises a flurry of questions about the adversary system itself. Must the game theory that is said to underlie the system lead to full-time game playing by counsel?<sup>47</sup> Must the court sit idly by, playing the role of a potted judicial plant, as a jury receives less than a full depiction of the facts?<sup>48</sup> Ought there to be some obligation upon counsel, particularly counsel to the state, to assure full disclosure of all relevant facts?<sup>49</sup>

Undoubtedly, Klonoff and Colby would view the answers to all these questions as far from significant. Zealous advocacy is the only name of their game, and in the service of winning that game anything that is not forbidden is not only permitted but required of dedicated counsel. Given the system we have, they may be correct. But if they are, what sort of system do we have?

Is it, for example, fairly described by one judge as follows?

It is common to hear a courtroom story unfold like a novel, changing as the trial proceeds. Sometimes the story becomes clearer, sometimes fuzzier, sometimes contradicted as it is embellished by the lawyer-maestros. Typically, as one side crafts a story, the other side expresses outrage, but then responds by adapting its own semifictional story.

The situation is not as dismaying as attorneys' acquiescence in it. In this sort of liars' paradise, evidence becomes a progressive sedimentation with new layers of lies. The trial degenerates into secondary issues—the defendant's pedigree, the etiquette of the police, discovery compliance, and experts' hourly fees.<sup>50</sup>

*Sponsorship Strategy*, although eschewing advocacy of any unethical behavior, provides little basis for expecting anything but "lawyer maestros" concocting ever more creative offerings. Yet the book itself may serve a useful function quite different from that intended by its authors. Whatever discussion it provokes of supposed "sponsorship costs," it may and should provoke far more discussion about the costs of the adversary system itself.

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47. See Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal With A Logical Sanctions Doctrine*, 20 CONN. L. REV. 7 (1987).

48. As Arizona Court of Appeals Judge Rudolph J. Gerber has observed: "Judicial spectatorship leads to indefensible patience where righteous anger would be appropriate. Judges evade their obligation under the canon of ethics to refer misbehaving attorneys for discipline. Small wonder when many judges' continued service depends on elections funded by the very lawyers who misbehave." Rudolph J. Gerber, *From the Bench: Victory or Truth*, LITIG., Spring 1990, at 3, 56.

49. The American Bar Association Model Code of Professional Responsibility recognizes that a public prosecutor must disclose exculpatory evidence to the defense. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981) ("[T]he prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."). A prosecutor is under no obligation to disclose exculpatory evidence to the court or jury.

50. Gerber, *supra* note 48, at 4; see also Alexander Greenfield, *Abolish the Adversary System*, CAL. LAW., Dec. 1981, at 11.

# Flying Blind in the Courtroom: Trying Cases Without Knowing What Works or Why

*Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials.* By Robert H. Klonoff \* & Paul L. Colby.\*\* Charlottesville: The Michie Company, 1990. Pp. xvii, 291. \$55.00.

Michael J. Saks†

How is a litigator to know “what works”? The implicit answer given by most books on trial advocacy is: from accumulated intuitions about which tactics are thought to be persuasive. In their recent book, entitled *Sponsorship Strategy*, Robert Klonoff and Paul Colby offer a different response. Their answer is: from the right theory. According to Klonoff and Colby, “there are a few basic rules—derived from sponsorship theory—that can be applied to resolve virtually every tactical issue at trial.”<sup>1</sup>

This attempt to formulate a coherent theory for deriving and evaluating principles of trial strategy makes *Sponsorship Strategy* a noteworthy addition to thought on trial advocacy. Nevertheless, *Sponsorship Strategy* may be remembered best for its unintended contribution of impelling us to recognize the barrenness of our knowledge about effective methods of advocacy. Klonoff and Colby argue convincingly that “the existing trial practice literature” is “inadequate and misleading.”<sup>2</sup> The cause of this problem, they assert, is that the existing literature is predicated on nothing more than practitioners’ accumulated intuitions: “[T]here is no trial book on the market containing any over-

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1. ROBERT H. KLONOFF & PAUL L. COLBY, *SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS* 11 (1990) [hereinafter cited by page number only].

2. P. 12.

arching principles."<sup>3</sup> As a result, "when an issue arises . . . the reader is expected to accept the advice wholly on faith."<sup>4</sup>

Unfortunately, Klonoff and Colby's theory only seems to advance this enterprise. Although *Sponsorship Strategy* offers overarching principles, it offers hardly any evidence supporting a conclusion that these principles are correct. Thus, *Sponsorship Strategy* leaves advocates in the same position they were in before, able only to pretend that they have some basis for knowing what works and what does not. That is because sponsorship theory, no less than collections of tactical intuitions, is not grounded in systematic empirical evidence of the phenomena it seeks to explain and control. Instead, it is logic built on premises that are guesses. After hundreds, even thousands of years of practice, we might justifiably have expected the art and science of advocacy to have developed a bit more than it has.

### I. THE TEACHINGS OF *SPONSORSHIP STRATEGY*

*Sponsorship Strategy* proceeds squarely from the premise that juries take evidence seriously.<sup>5</sup> Specifically, the book argues that the jury understands that advocates present a biased set of facts and arguments concerning a dispute in an effort to present the most favorable picture of their position.<sup>6</sup> As a consequence of this principle of "best case," the jury assumes that each side's evidence is no better than, and probably not as good as, the advocate presents it to be.<sup>7</sup> In addition, the jury assumes that advocates attempt to accomplish their task using minimum effort. That is, advocates will present as much as they need to in order to persuade the jury, but no more.<sup>8</sup>

3. P. 12.

4. P. 12. Klonoff and Colby are almost certainly correct to attack the accumulated intuitions of practitioners as a basis for proffering tactical advice. It is impossible to draw from a jury's verdict even remotely rigorous inferences about which of many important tactical choices "worked" and which did not. Add to this already complex mixture particulars about the case, witnesses, jurors, local and temporal social climate, and manifold other variables, and it becomes apparent that any inferences about "what works" that are drawn from "experience" with trials can be based on nothing more than intuition, leaps of inference, or plain delusion. Rigorous inferences can be drawn only from a far more systematic manipulation of tactics and gathering of data than goes on in the conventional practice of law.

5. This premise runs counter to much that is asserted or implied by trial behavior consultants (many of whom specialize in jury selection rather than evidence presentation) and by various critics of the civil justice system (who seem to believe that irrational decisions by juries are common rather than rare exceptions).

In a number of other writings, I have discussed evidence that suggests that these critics are mistaken (and therefore it appears that the most basic assumption of sponsorship theory is probably correct). See Michael J. Saks, *Blaming the Jury*, 75 GEO. L.J. 693 (1986); Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, LAW AND CONTEMP. PROBS., Autumn 1988, at 243 (1988); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

6. Pp. 19-20. The basic theory is presented in chapter two, pp. 17-45.

7. Pp. 20-22.

8. Pp. 20, 28. I could quibble that these propositions themselves render *Sponsorship Strategy* superfluous. There is no reason to suspect that juries believe these things, unless lawyers actually behave this way. But if lawyers already act in this fashion, then they have no need for a book to tell them to behave that

From these axioms flow a number of ideas about jury decisionmaking. First, the jury will accept nothing at face value except concessions. Thus, unfavorable evidence offered by a party will be given maximum weight. The jury will view favorable assertions as concessions that the facts are no better than what has been asserted. If a witness is called, the jury will assume that the advocate judged the testimony to be necessary to the advocate's case. Second, if counsel offers inferior evidence, the jury will assume that the advocate felt the case was weaker without the inferior evidence than with it. Therefore, if counsel adds weak evidence to an otherwise strong case, the jurors will devalue the strong evidence because of their inference that counsel would only have presented the weak evidence if he felt that the other evidence was not by itself sufficient to win. In effect, the choices advocates make give clues, which the jury uses to evaluate the case. One ramification, according to the authors, is that "the same item of evidence may be given significantly different weight depending on which side introduces it."<sup>9</sup>

The authors use these ideas regarding jury decisionmaking to develop the concept of "sponsorship costs." These costs, which constitute the risks associated with presenting—or sponsoring—evidence, include the cost of introduction, the cost of unusual efforts, and the cost of overtrying.<sup>10</sup> The cost of introduction refers to the jury's purported tendency to identify a piece of evidence with the advocate who introduces it. The jury believes that the advocate who introduces a particular piece of evidence believes the evidence is material and probative to resolving the case.<sup>11</sup> Further, the jury will assume the evidence is not as favorable to the introducing party as it appears to be (and, conversely, less harmful to the other party than it appears to be).<sup>12</sup> Thus, a piece of evidence I want introduced will do me more good if my adversary introduces it than if I do.

The cost of unusual efforts is an elaboration on the basic cost of introduction. The more trouble I appear to have gone to in order to present or withhold an item of evidence, the more the jury will adjust the weight given to the evidence to the disadvantage of my case. My effort signals to the jury what I think about the importance of the evidence. For example, if I have gone to unusual lengths to hold back an item of evidence, then the jury will infer that it must have been commensurately harmful to my case.

Finally, the cost of overtrying refers to the effect of additional evidence on the jury's assessment of the other evidence. For example, by putting on any

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way.

But to be fair, or perhaps generous, even if jurors only tend to believe these things, and even if lawyers already tend to behave this way, then following the authors' advice and pushing the tendency further might make one's case more persuasive than it otherwise would have been.

9. P. 45.

10. See pp. 36-45 (discussing these costs).

11. P. 37.

12. Pp. 37-38.

defense at all, I am conceding implicitly that the plaintiff or prosecutor presented a case strong enough to win unless I answer it effectively. Weakly supportive evidence or excess witnesses provide further illustrations of the cost of overtrying.

After presenting these concepts, *Sponsorship Strategy* applies them in some detail to a wide range of tactical decisions that arise in trial advocacy, including issue identification, evidence evaluation, and evidence selection. The authors show that sponsorship theory has the capacity to suggest solutions to the various tactical dilemmas that a litigator encounters. Perhaps most interesting, they show that the theory leads to some tactical decisions that are directly contrary to conventional litigation wisdom.<sup>13</sup>

A good illustration of a counterintuitive derivation from sponsorship theory is how an advocate should deal with harmful evidence that he expects the other side to present.<sup>14</sup> For example, suppose we know that the other side has a memorandum that will hurt our case. Conventional tactical wisdom holds that we should try to present the information to the jury before our adversary gets the chance to, so as to "take the sting out" of the evidence or increase the perception of our credibility or fairness. As *Sponsorship Strategy* notes, "virtually every trial manual urges the wholesale introduction of harmful evidence."<sup>15</sup>

However, "sponsorship theory counsels that, except in rare instances, harmful evidence should not be elicited by the advocate whose side is harmed by it."<sup>16</sup> The authors offer the following rationale for this conclusion:

To begin with, the cost of introduction normally acts to magnify the harmful impact of such evidence. As explained in Chapter Two, the jury assumes that the advocate has packaged the harmful matter in the light most favorable to its case. Thus, it will be inclined to believe that the matter is worse than it appears when presented by the advocate whose case is harmed by it. Moreover, the introduction of such evidence amounts to an implicit concession that the harmful matter is material to the resolution of the case. Finally, the use of such evidence relieves opposing counsel from the costs of having to introduce it himself.<sup>17</sup>

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13. In the context of challenging conventional wisdom, *Sponsorship Strategy* gives citations (sometimes extensive) to material that presents conventional tactical wisdom. For several examples, see *infra* text accompanying notes 47-62. The interested reader may follow my page references to *Sponsorship Strategy* and then *Sponsorship Strategy's* citations to the more conventional works of trial advocacy.

14. Sponsorship theory's advice on how to deal with harmful evidence is presented at a number of places in the book. For the most detailed of these discussions, see pp. 85-102.

15. P. 85. The authors continue: "As we will show, such advice is unsound and, if followed, can result in serious harm to the advocate's case." P. 15.

16. Pp. 95-96.

17. P. 86 (footnote omitted).

In short, sponsorship theory concludes that it costs more to bring out evidence harmful to oneself than to allow one's adversary to offer the evidence and then answer it.<sup>18</sup>

Plainly, *Sponsorship Strategy* is the work of practitioners who have thought deeply about their trials and the process of persuasion. Their resulting effort to develop a theory to guide trial tacticians is both unusual and important. Advocates will not get as far with a potpourri of phenomena (even accurate descriptions of the phenomena of persuasion) as they will with a valid theory of persuasion. Some wonderfully clever solutions are derived from sponsorship theory, which suggests that trial strategizing can be (or can become) an intellectually sophisticated and satisfying activity. Some of these tactical solutions counsel against using evidence that conventionally would be presented, suggesting that if lawyers had a good theory of persuasion, trials would be shorter and more refined affairs than they are now. Moreover, the authors deserve credit for courageously following sponsorship theory's derivations even to conclusions that are contrary to conventional, often unanimously endorsed, wisdom. These differences in tactical advice alone should unsettle teachers and practitioners of trial advocacy and set them to asking some hard questions.

## II. SPONSORSHIP THEORY IS UPSIDE-DOWN AND BACKWARDS

One of the questions which needs to be asked by those concerned with trial advocacy is: How can we determine which conclusions are correct and which are not? *Sponsorship Strategy* deserves applause for implicitly addressing this question. However, the answer it supplies—sponsorship theory—is both upside-down and backwards.

When I say that sponsorship theory is upside-down, I mean that it is deductive when it should be inductive. That is, it begins with general principles from which it derives assertions about specific phenomena, instead of beginning with well established phenomena of persuasion and then developing an abstract theory to explain them. When I say that sponsorship theory is backwards, I mean that its suggested applications precede the phenomena of persuasion when it should follow them. A positive theory is ready for application only after it has been empirically confirmed.

These are perfectly natural mistakes for lawyers to make. After all, the patterns of thought in which they have been trained resemble those of moral philosophers (so that they can evaluate, debate, and apply normative theory,

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18. The authors make the interesting point that if indeed it is better to offer evidence harmful to your case rather than waiting for the other side to do it, then prosecutors would be offering the defendant's evidence and defendants would be offering the prosecutor's evidence, in order to take the sting out of each other's cases. Pp. 104-05.

Notwithstanding the superficial cleverness of the above argument, the sponsorship analysis of this problem leads to what most likely is the wrong tactical solution. See *infra* notes 50-53 and accompanying text.

including legal doctrine) and descriptive historians (so they can investigate and present facts about singular, finite events from the recent past). These are perfectly good and valuable tools, but not for the task at hand. Although *Sponsorship Strategy* sets a task for itself that is plainly one of basic and applied behavioral science, the authors work with the only tools they know, and those are the wrong ones for this job.<sup>19</sup>

Sponsorship theory is a positive theory of human behavior. That is, it purports to account for a material, empirical phenomenon: What causes jurors to be persuaded by one or the other version of a case? In fields that build, test, revise, and replace positive theories, the early stages of work involve acquiring a sufficient grasp of the empirical phenomena of interest so that the theorist has something about which to theorize. A positive theory, after all, is an effort to explain some set of empirical phenomena.<sup>20</sup> Thus, unless positive theorizing is to be a pure (and meaningless) game, it cannot begin in earnest until some empirical data have been collected.

In subsequent stages, competing explanations are generated that vie with each other to provide the best account of the phenomena of interest. Predictions derived from those competing theories are tested against new observations, and on the results of these tests the theories can be evaluated. Some fall by the wayside, others are revised, and eventually one or several come to be regarded as the best current explanations of the phenomena of interest.<sup>21</sup>

The best available explanations of a phenomenon can guide practical problem solving with more than a faint hope that the solutions will work.<sup>22</sup> By this stage the effort becomes deductive—specific applications are derived from general theories.<sup>23</sup> But empirical evaluation remains the touchstone of

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19. Similarly, the authors' style of argument and use of authority is more suitable for persuading an audience about doctrinal issues as in a legal brief. If the assertion they want to make can be found to have been uttered by a trial manual, a newspaper column, *The Bible*, or even a work of fiction, this is cited as evidence that the general empirical proposition is true. A general empirical fact is not established, however, by citing a rule or a case that relies on the same assumption. For purposes of determining "what works," an advocate wants to know what *really* works, not merely that a rule drafter or a judge shares the authors' intuitions. Scholars and practitioners in few other fields are so casual about the evidence on which they rely.

20. Most scientists spend far less time disagreeing about empirical phenomena, which are relatively easy to establish, and most of their time on what they regard as the serious business of knowledge building: developing and testing competing theories to account for those well established and relatively uncontroversial phenomena. For two good examples in the social and behavioral sciences, see JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1988) (reviewing best established empirical phenomena of crime frequency before offering and testing new theory of crime control); RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986) (reviewing empirical findings on attitude change and proposing new theory to account for persuasion).

21. This is about as far as science (of all kinds) goes. That is, it does not proceed to application. It does, of course, continue generating and testing new theories, because theories are human inventions for making progressively better sense of empirical phenomena. Because theories vary in the range of phenomena they purport to explain, the number of concepts they employ, the accuracy of their accounts, and so on, there are varied bases on which to conclude that some theories are better than others.

22. At this stage we are talking about engineering or applied science.

23. This is the point at which sponsorship theory appears on the scene, having exempted itself from induction and theory testing, boldly offering prescriptive advice.



effectiveness. The theory is a guide to an application, not a justification for it. The only way to know if an application (or any other solution) works is to evaluate it empirically.<sup>24</sup>

Although the above description is an idealization of how positive theories are developed and used—the building, testing, and application of knowledge are messier than textbook descriptions of them—it provides some basis for thinking about the nature and role of sponsorship theory.

Sponsorship theory purports to explain jury decisionmaking, yet it is not grounded in empirical generalizations about what persuades jurors. Instead, its essential propositions are assumptions made by its authors. Numerous assertions about what juries assume, think, and decide are woven in to strengthen these threads.<sup>25</sup> But the authors offer no direct evidence to support their claim that juries in fact behave in the stated ways. The same can be said about the derivations from sponsorship theory.

To the extent that sponsorship theory's propositions are supported at all, we find only an assortment of quotations from legal treatises,<sup>26</sup> articles,<sup>27</sup> cases,<sup>28</sup> rules,<sup>29</sup> one forty-year-old psychology treatise,<sup>30</sup> a letter from Abraham

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An apt comparison can be drawn with a recent attempt to reproduce the ecology of the earth in a dome built in Arizona: "A number of scientists have criticized the venture for its 'top-down approach,' in which rigorous, incremental scientific method is tossed aside for a grand hubristic attempt . . ." Seth Mydans, *8 Sealed in a World Beneath Glass for 2 Years*, N.Y. TIMES, Sept. 27, 1991, at A1, A10.

24. This is often easier said than done. *But see infra* Part III.

25. Here are two illustrations:

[T]he jury assumes that each advocate will make every contention and introduce all available evidence that he believes will materially favor his case. . . . [T]he jury utilizes its assumption of best case in a negative manner. Specifically, it is apt to infer that each side's case can be *no better* than that stated by the attorney.

P. 20.

Juries have an insatiable appetite for concessions from the advocates. . . . [T]he only parts of the advocate's presentation that will be strictly relied upon in the jury room, even in the absence of evidence, are those that are *unfavorable* to his case . . . .

P. 22.

26. To illustrate their assertion that many commentators agree that cases should not be overtried, Klonoff and Colby cite JOHN A. APPLEMAN, PREPARATION AND TRIAL 211 (1967) ("[D]on't forget one primary rule. Never overtry a case."). P. 44 n.40.

27. Klonoff and Colby cite Richard M. Markus, *A Theory of Trial Advocacy*, 56 TUL. L. REV. 95, 102-03 (1981), to support the idea that juries suspect that lawyers manipulate witnesses at pretrial conferences in order to produce the most favorable testimony. P. 38 n.32.

28. The authors support their assertion that "[e]verything the advocate says or does is treated [by the jury] as if the party he represents had said or done it" by citing *McLhinney v. Lansdell Corp.*, 254 A.2d 177, 180 (Md. Ct. Spec. App. 1969), (client is legally bound by the admissions of his or her attorney in opening statement). P. 21 n.11.

29. The authors cite FED. R. EVID. 801(d)(2) advisory committee's note (describing admissions by party opponent as exceptions to hearsay rule) to support the proposition that juries have an insatiable appetite for concessions. P. 22 n.14.

30. To support their claim that juries assume lawyers will use minimum effort, the authors cite GEORGE K. ZIFF, *HUMAN BEHAVIOR AND THE PRINCIPLE OF MINIMUM EFFORT* 6 (1949). *See* p. 20. Klonoff and Colby assume that juries share Zipf's conclusion, and use it to assess what unfolds before them at trial.

Without addressing the merits of Professor Zipf's theory, one may note that he went to great pains to link his theory to relevant empirical evidence. That is one lesson Klonoff and Colby did not take from Zipf's book.

Lincoln,<sup>31</sup> incidents in works of fiction,<sup>32</sup> a book on ancient Greek ideas about persuasion,<sup>33</sup> some news clips,<sup>34</sup> and a few other odds and ends.<sup>35</sup> Some of these sources tell us what lawyers and the rules of law say or imply are the nature and assumptions of the adversary system. That much is fine. But in what sense do they double as evidence of how jurors in fact evaluate and use information? How does it follow that jurors share those beliefs and act on them? The two are simply fused into one.

But if such intuitions, when contained in trial practice manuals, were to be rejected by the authors as unfounded and misleading, why are equivalent intuitions now sufficiently trustworthy to supply the basic truths on which to build sponsorship theory? Similarly, there is no point in readers asking themselves if they find that the bases or conclusions of sponsorship theory comport with their own intuitions. *Sponsorship Strategy* began by rejecting such intuitions as the road to tactical knowledge.

More persuasive than any of those tidbits is the essential plausibility of the theory as the authors present it to us. Yet plausibility hardly represents a sufficient criterion for judging a positive theory. *All* ideas offered for public or professional consideration are plausible, otherwise they would receive no consideration whatsoever.

The authors' purported success in applying sponsorship theory<sup>36</sup> is of illusory value. Medicine, for example, once relied on just this sort of case

31. To support their assertion that an advocate endorses the materiality of any evidence she introduces, Klonoff and Colby cite a letter from Abraham Lincoln to Usher F. Linder (Feb. 20, 1848), in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 453 (Roy P. Basler ed., 1985) ("In law it is good policy to never plead what you need not, lest you oblige yourself to prove what you can not."). See p. 29 n.20.

32. The authors support the proposition that the greater the lawyer's effort to bring something out the less impact it will have by recounting scenes from ROBERT TRAVER, ANATOMY OF A MURDER (1958), and SCOTT TUROW, PRESUMED INNOCENT (1987). P. 32 n.25.

33. Klonoff and Colby cite GEORGE A. KENNEDY, THE ART OF PERSUASION IN GREECE (1963), to support the assertion that juries expect advocates to attack their opponents. See p. 33 n.27.

34. To further support the asserted value of direct attack on one's opponent, the authors refer to a column by Patrick Buchanan, *Keep Up the Pressure George*, SAN DIEGO UNION, Aug. 30, 1988, at B7 (noting that George Bush turned 18-point deficit into 6-point lead during one month of attacking Michael Dukakis's views). See p. 34 n.28.

35. To support the proposition that people evaluate a statement with reference to its apparent source, Klonoff and Colby cite ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER (1983) (Johnson's staff composed newspaper releases that were later printed as articles rather than as paid advertisements because the communications were believed to "carry more weight [that] way."). See p. 25.

A good deal of attitude change research has examined these "source effects," mapping many of their contours, including some conditions under which the weaker source, surprisingly, produces about the same amount of attitude change as the higher credibility source. See Thomas D. Cook et al., *History of the Sleeper Effect: Some Logical Pitfalls in Accepting the Null Hypothesis*, 86 PSYCHOL. BULL. 662 (1979); Carl I. Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635 (1951).

36. See p. 11 ("Prior to recognizing and applying sponsorship theory, both authors lost several strong cases after faithfully applying conventional trial techniques. These losses occurred notwithstanding the authors' thorough familiarity with trial procedure and techniques . . . By contrast, both authors repeatedly won even their most difficult cases . . . once they identified and perfected the principles outlined in this book."); p. 290 ("[W]e have found from our experience that the benefits to be gained from applying [sponsorship] principles are considerable.").

experience backed by theory or logic to determine the effectiveness of its treatments. But when many of the most widely favored surgical procedures were systematically studied, only about a third were found to be effective. The remaining procedures were found to have either no effect or to do more harm than good.<sup>37</sup> If "hands on" clinical experience can be so misleading in correctly assessing the impact of specific surgical procedures, it is hard to imagine that it will be of greater assistance in accurately discerning the causes of trial outcomes.

Let us assume that Klonoff and Colby did lose cases early in their careers that they expected to win, and won later cases that they expected to lose.<sup>38</sup> Although they attribute their increased success to the invention of sponsorship theory, any number of other, unknown changes may have occurred as well.<sup>39</sup> As they matured they may have developed a poise, presentational style, or rapport with jurors that they lacked as beginners.<sup>40</sup> Over time the strength of evidence in the cases the prosecutor's office brought to trial—due to changes in office policies, in plea-bargaining patterns, in quality of evidence gathering, or in crimes being committed—may have changed. Or, as young prosecutors, Klonoff and Colby may have been assigned weaker cases than more seasoned prosecutors in a kind of legal triage. Or the public's propensity to convict may have changed. Or any of a thousand other things may have changed.

The authors offer no empirical evidence about the extent to which juries process information as the theory assumes they do, or about sponsorship theory's ability to accurately predict how different tactics will affect jurors. The evidence of effectiveness *Sponsorship Strategy* offers on its own behalf is so uninterpretable<sup>41</sup> that in few fields would it be taken seriously. Thus, without first demonstrating that it is capable of explaining any established phenomena

37. John P. Gilbert et al., *Progress in Surgery and Anesthesia: Benefits and Risks of Innovative Therapy*, in COSTS, RISKS, AND BENEFITS OF SURGERY 124 (John P. Bunker et al. eds., 1977).

38. Incidentally, as prosecutors, the authors conducted "approximately one hundred trials" in all. P. 10. How many of those trials can they be talking about as their sample for testing sponsorship theory? The authors concede that over many aspects of a case "the advocate has little or no control. For example, once the advocate has completed a thorough factual investigation, he is 'stuck' with his facts." P. 290. Moreover, the evidence in most cases is sufficiently clear that there is not a lot of doubt in the outcome. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 55-65 (1966) (discovered in survey of hundreds of trials that well under half were judged "close," and judges and juries agreed on verdicts about 80% of time). Furthermore, most prosecutors' offices have high win rates in part because they avoid taking weak cases to trial. See Albert J. Reiss, *Public Prosecutors and Criminal Prosecution in the United States of America*, 20 JURID. REV. 1, 1-3, 8-15 (1975). Thus, the number of cases in the gray zone where sponsorship theory had a reasonable chance of making a difference had to be far smaller than 100.

39. Such unknown changes are what empirical researchers call "confounds." Recall the discussion of the difficulties associated with drawing inferences from jury verdicts, *supra* note 4.

40. This sort of professional maturation was noted by Lord Justice Matthews, who is reputed to have said: "When I was a young man practicing at the bar, I lost a great many cases I should have won. As I got along, I won a great many cases I ought to have lost; so on the whole, justice was done."

41. The uninterpretable nature of the evidence also means that if Klonoff and Colby had lost more cases after inventing and deploying sponsorship theory, they might mistakenly have abandoned it as ineffective. Those losses, however, might have been due to factors other than sponsorship theory that they neglected to take into account.

of persuasion, sponsorship theory leaps into existence and offers its prescriptions for trying cases.<sup>42</sup> A positive theory built without an empirical foundation is no more likely to provide useful guidance to an advocate than the equally ungrounded intuitions of practitioners and authors of trial manuals. "Overarching principles" built on one's guesses do nothing to validate the tactical choices derived from the theory, and they certainly do nothing to make the foundational guesses any better than they were in the first place. In the end, "the reader is expected to accept the advice wholly on faith."<sup>43</sup>

### III. HOW COULD WE KNOW IF SPONSORSHIP THEORY IS CORRECT?

In spite of its brittle ingredients, sponsorship theory still might turn out to be a valid and powerful theory. Some people are lucky guessers or have better intuition than others. How might we test sponsorship theory's validity?

The simplest and crudest way to test the claims of sponsorship theory would be to obtain a large sample of cooperating attorneys and divide them at random into two groups. The two groups would then be equivalent in respect to age, education, personalities, skills, types of practice, and other variables that might make a difference between the groups. Train one group of lawyers in sponsorship strategy and the other in a competing theory or set of tactics, and send them all out to try cases for a few years. If the sponsorship lawyers won a significantly greater number of cases than the other lawyers, we would have good evidence that sponsorship strategy made a difference because it would be difficult to attribute the difference to anything else.<sup>44</sup>

A more refined approach would involve testing specific derivations from the theory. People who do empirical research testing positive theories typically design studies capable of yielding data that will confirm or disconfirm the theory.<sup>45</sup> Ideally, two or more competing theories can be pitted against each other in "crucial experiments." That is, contrary hypotheses derived from two (or more) theories are tested in new situations.<sup>46</sup> Those that predict correctly gain support; those that do not lose support. *Sponsorship Strategy* lays excellent groundwork for this type of theory testing, since it presents a large number of

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42. Thus, sponsorship theory is deductive before it is inductive, and it precedes rather than follows any empirical phenomena.

43. P. 12. This, you will recall, is *Sponsorship Strategy's* criticism of the trial advocacy literature generally. See *supra* notes 3-4 and accompanying text.

44. This is called the "program evaluation" approach. Even with this approach, however, we eventually would want to disassemble the package of techniques and identify which among them were the active ingredients, which were counterproductive, and which were neither more nor less effective than alternative tactics.

45. This is not to say that a single experiment decides a theory's fate. But many studies by many different researchers gradually build a track record for a theory.

46. Where theories make the same predictions, there is nothing to test and little to choose between. An advocate would derive the same conclusions from either one. Only where they lead to different predictions is there something of importance for researchers and practitioners to investigate.

hypotheses concerning effective trial tactics, many of which are contrary to conventional trial practice wisdom.

For example, "[s]ome manuals advise calling multiple witnesses to testify on the same factual area, irrespective of the strength of each witness. Sponsorship theory rejects this advice."<sup>47</sup> This hypothesis could be tested in a variety of ways. Imagine that in a mock trial setting, perhaps in the context of a National Institute of Trial Advocacy course, advocates tried the same case with a single strong witness or a strong plus a medium plus a weak witness on some disputed factual issue.<sup>48</sup> If more favorable verdicts were won when the single strong witness was presented than when multiple witnesses were presented, confidence in sponsorship theory would be strengthened. Otherwise, it would be weakened. A comparable research strategy could be developed using cooperating lawyers in actual cases.<sup>49</sup>

To an extent, enough such work has already been done to permit some empirical assessment of sponsorship theory. Although the book cites none of this work, thousands of empirical studies of attitude change have been conducted over the past half-century by psychologists, market researchers, communications researchers, and others. Some of these studies are germane to tactics derived from sponsorship theory.<sup>50</sup>

For example, recall the earlier discussion concerning the conventional advice to "de-fang" harmful evidence by presenting it before your opponent does—advice that sponsorship theory rejects as a serious tactical error. A series of experiments was conducted in order to discover how to induce resistance to persuasion.<sup>51</sup> In one study, people were prepared in one of three different ways for an attack on certain of their beliefs. These were to (1) present supportive arguments in favor of the beliefs, (2) present a weakened attack on the beliefs plus arguments with which to counter the attack (this was termed an "inoculation" tactic since it resembled the way vaccines work), or (3) leave the audience unprotected and merely allow the attack to occur. The inoculation method was by far the most successful in blunting the effectiveness of the later

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47. P. 191 (footnote omitted).

48. *Sponsorship Strategy* defines favorable evidence as "evidence which, on balance, makes the advocate's position more probable in the jury's eyes than it would have been without such evidence." P. 63 (footnote omitted). Favorable evidence varies along a relative scale and can be roughly judged to be strongly, moderately, or only weakly helpful to an advocate.

49. I sketch a research program of this kind in more detail elsewhere. See Michael J. Saks, *Turning Practice into Progress: Better Lawyering Through Experimentation*, 66 NOTRE DAME L. REV. 801 (1991). The prospect of systematically experimenting with one's clients' cases would raise precisely the same ethical issues for the practice of law that have already confronted other fields, such as medicine or psychology, that create knowledge with, for, and about human beings. See generally JAY KATZ, *HUMAN EXPERIMENTATION* (1972).

50. These studies need not involve legal advocacy. After all, *Sponsorship Strategy* states that its concepts are equally applicable to any kind of advocacy, not just to trials. See p. 288 ("[S]ponsorship doctrine dominates the rhetoric of any interested speaker, regardless of whether he faces an opponent.").

51. This would be analogous to a prosecutor or plaintiff's attorney having persuaded a jury to believe a particular view of a factual issue and then trying to prevent the defense from weakening or reversing that belief during its turn.

attack.<sup>52</sup> These findings suggest that the conventional approach that advocates use to deal with harmful evidence (which resembles the inoculation technique) is more effective than the one recommended by sponsorship theory (which takes the form of either the unprotected attack or the supportive defense). Other research similarly shows that two-sided arguments are more effective than one-sided arguments when the audience is going to hear competing views on the same issue.<sup>53</sup>

Another example of a testable hypothesis is sponsorship theory's conclusion that a single witness with strong testimony to offer will be more effective than that witness plus additional witnesses whose evidence is less strong.<sup>54</sup> On this issue, sponsorship theory is consistent with a great deal of empirical research on attitude formation. A typical example of that research presents participants with, say, three items of strongly positive information concerning a person about whom a general impression is to be formed. In other conditions, participants are presented with other combinations of information, such as three strongly positive plus three moderately positive bits. The findings showed that people had more positive impressions when only strongly positive information was presented.<sup>55</sup>

On the other hand, sponsorship theory suggests that using more than the minimum favorable evidence required to establish a point will weaken rather than strengthen a case.<sup>56</sup> Sponsorship theory holds that using two witnesses when one can establish the same point makes the primary witness look weaker, because it suggests to the jury that the advocate thought this witness alone was insufficient.<sup>57</sup> Empirical studies of the effect of repetition, however, suggest

52. William J. McGuire & Demetrios Papageorgis, *The Relative Efficacy of Various Types of Prior Belief-Defense in Producing Immunity Against Persuasion*, 62 J. ABNORMAL & SOC. PSYCHOL. 327 (1961). See generally William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, in 1 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 191 (Leonard Berkowitz ed., 1964) (reviewing research and theory on developing resistance to audience persuasion).

53. See, e.g., CARL I. HOVLAND ET AL., EXPERIMENTS ON MASS COMMUNICATION (1949); Arthur A. Lumsdaine & Irving L. Janis, *Resistance to "Counterpropaganda" Produced by One-Sided and Two-Sided "Propaganda" Presentations*, 17 PUB. OPINION Q. 311 (1953).

54. Pp. 30, 63-64, 191-92. The same advice applies to arguments, p. 251. Recall that sponsorship theory's advice is contrary to that offered by trial manuals that recommend presenting multiple witnesses on the same point, even if some will be stronger and others weaker.

55. See Norman H. Anderson, *Averaging Versus Adding as a Stimulus-Combination Rule in Impression Formation*, 70 J. EXPERIMENTAL PSYCHOL. 394, 397 (1965); Norman H. Anderson, *Integration Theory and Attitude Change*, 78 PSYCHOL. REV. 171, 181 (1971); Barbara K. Sawyers & Norman H. Anderson, *Test of Integration Theory in Attitude Change*, 18 J. PERSONALITY & SOC. PSYCHOL. 230, 231 (1971). These empirical findings were part of an effort to test competing models of how people combine information into a single impression. The findings tended to support a weighted averaging model.

56. See p. 41 ("[T]he introduction of such additional evidence can result in a negative impact on the weight that the jury assigns to the advocate's other evidence."); see also pp. 41-43, 190. At other places the suggestion is hedged a bit.

57. There is a hint that sponsorship theory also supposes that one piece of equivalent evidence sitting next to another piece causes jurors to devalue the other piece. A phenomenon like this occurs when two pieces of information *differ* in strength sufficiently enough to be "contrasted" with each other. A weak piece will appear even weaker in the midst of several strong pieces. But if strong items of evidence are paired with an item that is slightly less strong, the latter will be "assimilated" upward to appear equivalent to the

that repetition increases persuasiveness, although this advantage disappears when the number of repetitions becomes excessive.<sup>58</sup> The research evidence indicates that message repetition increases the number of supportive thoughts and reduces the number of counterarguments people generate in response to the message. Importantly, this applies only to strong arguments or evidence. With weak arguments, the opposite occurs, because repeated exposure to weak evidence leads the audience to think of more counterarguments.<sup>59</sup>

In discussing the timing of the defense's opening argument, Klonoff and Colby join with numerous trial manuals in suggesting that the defense present its opening immediately after the plaintiff or prosecution, rather than waiting until the start of the defense's case in chief.<sup>60</sup> The study that is most nearly on point finds that when two contrary messages are presented, the time delay between the messages and the audience's decision, as well as between the two messages themselves, is important. Where two messages are presented in quick succession, and the decision is made after a time delay (which is the situation in a trial if the two opening arguments are made at the beginning of the trial), then, all else being equal, the first message will have more impact (that is, a primacy effect operates). If a delay is interposed between the first and second message, the two will be equally influential.<sup>61</sup>

But Klonoff and Colby make the important point that the purpose of a defense opening argument at the start of the trial is to assist the jury in generating counterarguments to the evidence presented by the plaintiff's or the prosecutor's witnesses.<sup>62</sup> Interestingly, this process does not grow out of sponsorship theory and is not mentioned elsewhere in the book in regard to many (or perhaps any) other tactical choices. If the experiment suggested two footnotes ago found that back-to-back opening arguments at the start of a trial were more helpful to the defense than delaying its opening, this would be the likely

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others. Muzafer Sherif & Carl I. Hovland, *SOCIAL JUDGMENT: ASSIMILATION AND CONTRAST EFFECTS IN COMMUNICATION AND ATTITUDE CHANGE* (1961).

58. John T. Cacioppo & Richard E. Petty, *Effects of Message Repetition and Position on Cognitive Response, Recall, and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOL. 97 (1979) (3 repetitions were better than 1, but 5 had an effect little better than 1).

59. John T. Cacioppo & Richard E. Petty, *Effects of Message Repetition on Argument Processing, Recall, and Persuasion*, 10 BASIC & APPLIED SOC. PSYCHOL. 3 (1989).

60. Pp. 170-73.

61. Norman Miller & Donald T. Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 J. ABNORMAL & SOC. PSYCHOL. 1, 8-9 (1959). The psychological processes implicated by these findings are the interplay of primacy and forgetting. All other things being equal, the first message heard tends to dominate the resulting attitude. But if the attitude measure is taken so long after the first message that memory of it has decayed, though soon enough after the second message that it is still remembered, then the second message will have more impact. A trial is a more complex series of messages alternating against each other, so this study may not generalize to the trial situation. A useful study might simply present two versions of a videotaped trial to mock jurors, one with the defense's opening argument in the earlier position and one with the argument in the later position (and perhaps a third version that completely omits the defense's opening, to see if the effects of one of the other versions resemble no argument at all).

62. P. 172.

explanation for it.<sup>63</sup> Only appropriately designed empirical research can tell us which of these two competing processes is more influential in determining the impact of the timing of opening arguments on ultimate verdicts.

This review of empirical findings germane to the tactical derivations of sponsorship theory illustrates how the theory might be tested. Even so, two lessons can be drawn from the exercise. First, a test of the validity of this or any other positive theory is both possible and necessary. Second, and more substantively, some of *Sponsorship Strategy*'s advice is consistent with empirical studies of the tactics in question while some is not.<sup>64</sup> Since sponsorship theory is not built on systematic evidence about the phenomena it purports to explain and was not subjected to serious testing, it would not be surprising to find that at least some of the advice it offers is erroneous. This realization should produce hesitation in potential users.<sup>65</sup>

#### IV. CONCLUSION: WILL TRIAL ADVOCACY EVER GET BETTER?

*Sponsorship Strategy* opens by dismissing the existing trial practice literature as inadequate and misleading. Klonoff and Colby's principal basis for this conclusion is the absence of valid, overarching theoretical principles in that literature. While this may be a sound conclusion, the more fundamental element lacking in the study of trial practice is systematic evidence about what works and what does not. But whichever diagnosis one prefers to believe, sponsorship theory does nothing to remedy the deficiencies of the trial practice literature or, indeed, of trial practice itself.

With neither sound observations nor valid theory to guide them, both students of trial practice and trial practitioners have no choice but to fly blind when they try cases. "Experience" is insufficient. The number of tactical choices to be made in a single trial is great, while the number of cases tried by a litigator each year is small. Thus, attributing a verdict in any given case to a particular tactical choice can be nothing more than conjecture. As a result, the world of trial practice is ruled by intuition, guesswork, and shared hunches. All of it, so to speak, is trial and error.

Will the state of the trial practice art ever improve? The answer almost certainly is yes, if only because there is so much room for improvement. For several reasons, prospects for real advances in practice knowledge do exist.

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63. The phenomenon of recipient, self-generated counterarguments (or, more generally, cognitive response to persuasion) has been found to be an important process in much persuasion research. See Richard E. Petty et al., *Historical Foundations of the Cognitive Response Approach to Attitudes and Persuasion*, in *COGNITIVE RESPONSES IN PERSUASION 1* (Richard E. Petty et al. eds., 1981). For example, it offers an explanation for the effectiveness of de-fanging an opponent's argument—less metaphorical than inoculation, but more descriptive of what the audience is thinking while it listens. Giving the audience counterarguments for the harmful evidence that is to come makes them better able to resist it.

64. Lack of empirical support seems to plague many areas of study, including intuitions and theories about surgical interventions. See *supra* text accompanying note 37.

65. On the other hand, there is no evidence that conventional wisdom provides better results in trials.



First, whatever its limitations, *Sponsorship Strategy* reflects a serious interest in developing theory about what works. Second, a large empirical and theoretical literature on the subject of persuasion exists, and perhaps some day people interested in trial advocacy will translate that literature into a form useful to lawyers.<sup>66</sup> Finally, the tools exist for testing trial tactics and obtaining relatively unambiguous answers about what works and what does not. Sooner or later, litigators and scholars of advocacy will come along who really want to know what works, and they will begin systematic empirical testing of various tactics and techniques.<sup>67</sup>

On the other hand, perhaps the reason that trial advocacy is not taken more seriously by lawyers stems from the perfectly rational view held by many that they go to trial only when they have failed at their actual business (the settlement of disputes). The less time, energy, and resources invested in trials, the better, because lawyers lose money on trials; settlements are more profitable.<sup>68</sup> Such an analysis means that most or all trial lawyers will never move beyond the stage of flying blind. And perhaps that is as it should be. If lawyers select tactics in an essentially random fashion, the result will be to minimize the impact of tactics on trial outcomes and to maximize the effect of evidence. Under precisely such a system justice is most likely to be done.

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66. Some trial practice texts do make some use of this literature.

67. For a proposal that NITA undertake such a research program, before a narrower slice of the legal profession beats the organization to it, see Saks, *supra* note 49, at 807-10.

68. A settlement usually is achieved as the result of a few conversations and produces fees for counsel on both sides of a case. A case that goes to trial consumes considerably more time—both before and during trial—than does a case that settles, without yielding proportionately greater fees. In the same time it takes to try a few cases, a lawyer can make more money settling many cases.

